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EQUALITY CALIFORNIA and
GAY-STRAIGHT ALLIANCE NETWORK

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA EDUCATION COMMITTEE, LLC and PRISCILLA SCHREIBER, Plaintiffs, v. ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of the State of California; JACK O'CONNELL in his official capacity as California Superintendent of Public Instruction; and DOES 1 through 20 inclusive, Defendants.	Case No.: 07-CV-02246-BTM-WMC **RESPONSE OF PROPOSED DEFENDANT-INTERVENORS AND PROPOSED AMICI CURIAE EQUALITY CALIFORNIA AND GAY-STRAIGHT ALLIANCE NETWORK TO PLAINTIFFS' NOTICE OF OPPOSITION TO AMICI CURIAE EQUALITY CALIFORNIA AND GAY-STRAIGHT ALLIANCE NETWORK'S MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS** Date: None Specified Time: None Specified Courtroom: 15 Judge: Hon. Barry Ted Moskowitz

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RESPONSE TO PLAINTIFFS' NOTICE OF OPPOSITION TO AMICI MEMORANDUM

1. Equality California and the Gay-Straight Alliance Network ("GSA Network") respectfully submit the following Response to Plaintiffs' Notice of Opposition (filed January 21, 2008) to the Proposed Amici Curiae Memorandum that Equality California and the GSA Network submitted to the Court electronically on Friday, January 18. Equality California and the GSA Network regret the need to trouble the Court with the matters discussed herein.

2. On Friday, January 11, 2008, the State Defendants in this action filed a Motion to Dismiss, which is scheduled to be heard on February 15, 2008, the same date on which the Court is scheduled to hear a Motion for Intervention filed by Equality California and GSA Network. The State Defendants' Motion to Dismiss is based on both Rule 12(b)(1) (lack of subject matter jurisdiction) and Rule 12(b)(6) (failure to state a claim).

3. On Friday, January 18, 2008, Plaintiffs, State Defendants, and Proposed Intervenors/Proposed Amici Curiae Equality California and GSA Network filed a Joint Motion and lodged a proposed order that, if approved by the Court, would authorize Equality California and GSA Network to file on that date (January 18, 2008) a proposed amici memorandum in support of the State Defendants' Motion to Dismiss. The conversations among counsel in advance of the January 18, 2008 Joint Motion did not address the content of the proposed amici memorandum, other than describing the proposed memorandum as supporting the State's Motion to Dismiss. Equality California and GSA Network timely submitted their proposed amici memorandum on January 18, 2008, just seven days after the State Defendants filed their Motion to Dismiss, and a full twenty-eight days before the scheduled hearing on the Motion to Dismiss, in order to provide the Court and the parties adequate time to consider the points and authorities contained therein.

4. On Monday, January 21, 2008, Plaintiffs, through their counsel, filed a "Notice of Opposition," stating that they oppose the inclusion in the proposed amici memorandum of arguments pertaining to the legal sufficiency of the vagueness cause of action, which, Plaintiffs contend, are beyond the scope of the Defendants' Motion to Dismiss, which the State Defendants based on both Rule 12(b)(1) and Rule 12(b)(6). Plaintiffs' Notice of Opposition requests that the

Court either disregard the Rule 12(b)(6) arguments that Proposed Amici, but not the State Defendants, have raised or provide the Plaintiffs sufficient time to respond to the arguments to which Plaintiffs object.

5. Equality California and GSA Network wish to bring the following matters to the attention of the Court:

a. In contrast to principles that various appellate courts apply in determining whether to consider arguments that amici, but not parties, raise, it is solidly within the discretion of a district court to decide whether and when to consider such arguments proffered by amici. *See, e.g., Trunk v. City of San Diego,* 2007 U.S. Dist. LEXIS 82647 (S.D.Cal. 2007) (Southern District of California Judge Burns directed the parties to address an issue raised by Amicus Pacific Justice Institute in support of Defendants' motion to dismiss either in the parties' "briefing on the motion to dismiss, or in a subsequent motion."). There is certainly nothing inappropriate about amici curiae presenting to the District Court arguments in addition to those presented by the parties so that the Court may consider how best to decide a case.

b. The arguments of Proposed Intervenors/Amici to which Plaintiffs object are Rule 12(b)(6) arguments that, though the State Defendants have not yet raised, can be fairly deemed included in a Rule 12(b)(6) Motion, which the State Defendants have filed and can, in the alternative, be considered in the near future as part of a Motion for Judgment on the Pleadings under Rule 12(h)(2) should this action continue through completion of the pleading stage. Proposed Intervenors Equality California and GSA Network have included in their proposed Answer in Intervention an affirmative defense of failure to state a claim (which needs only to be pleaded generally).

c. It appears from Plaintiffs' Notice of Opposition that Plaintiffs desire guidance as to whether, and if so, when, they should address arguments regarding the void-for-vagueness claims that are contained in section B of the Argument section of the Proposed Amici Memorandum, from page 10, line 23, to page 20, line 6. Equality California and GSA Network do not oppose Plaintiffs' apparent request for guidance from the Court as to whether and when to address the above-referenced arguments.

6. Equality California and GSA Network's Motion to Intervene is currently scheduled to be heard on February 15, 2008, at 11:00 a.m. All parties to the case – Plaintiffs and Defendants – have represented in the Joint Motion regarding the Amicus Brief filed with the Court on January 18, 2008 that the parties do not oppose Equality California and GSA Network's Motion to Intervene. Given the lack of opposition to Equality California and GSA Network's Motion to Intervene, should this Court rule in advance of February 1, 2008 (the due date for parties' responses to the State's Motion to Dismiss) that Equality California and GSA Network may intervene as party defendants, Equality California and GSA Network would promptly resubmit their amicus brief (with minor corrections) as a party Response to the State Defendants' Motion to Dismiss.

CONCLUSION

For the foregoing reasons, Amici request that this Court (1) grant the Joint Motion submitted January 18, 2008 requesting leave for Equality California and GSA Network to file a Memorandum as Amici Curiae in support of the State's Motion to Dismiss; (2) provide any guidance that the Court in its discretion may deem advisable regarding whether or when the parties should address any particular arguments contained in the Proposed Memorandum of Amici Curiae submitted on January 18, 2008; and (3) give consideration to expedited resolution of

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Equality California and GSA Network's Motion to Intervene, in light of the parties' non-opposition to that motion.

Dated: January 22, 2008

Respectfully submitted,

ROBERT S. GERBER
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CERTIFICATE OF SERVICE

I am employed in the City and County of San Diego; I am over the age of eighteen years and not a party to the within entitled action; my business address is 12275 El Camino Real, Suite 200 San Diego, California 92130.

On January 22, 2008, I served the following document(s) described as:

RESPONSE OF PROPOSED DEFENDANT-INTERVENORS AND PROPOSED AMICI CURIAE EQUALITY CALIFORNIA AND GAY-STRAIGHT ALLIANCE NETWORK TO PLAINTIFFS' NOTICE OF OPPOSITION TO AMICI CURIAE EQUALITY CALIFORNIA AND GAY-STRAIGHT ALLIANCE NETWORK'S MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

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[X] **FEDERAL**: I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 22, 2008, at San Diego, California.

s/ Rosa Urias
Rosa Urias